# Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

In the Matter of	)	
Federal Preemption of Anne Arundel County Ordinance Regulating Radio Frequency Interference	) ) )	File No. WT 02-100

#### **SPRINT COMMENTS**

Sprint Corporation, on behalf of its wireless operating division, Sprint Spectrum L.P. d/b/a Sprint PCS ("Sprint"), submits these comments in support of the declaratory ruling petition that Cingular Wireless filed on April 23, 2002.<sup>1</sup>

#### **SUMMARY**

Sprint has constructed a nationwide CMRS network over the past six years. Although Sprint has had great success in constructing its network, it has faced regulatory challenges in the process. In addition to the federal regulatory requirements imposed by the Commission, the local zoning approval process has become increasingly complex, contentious and time consuming. Nationwide, it currently takes over 19 months on average for Sprint to construct a new cell cite due to delays in the zoning approval process. Other sites are not approved, despite being carefully chosen.

<sup>&</sup>lt;sup>1</sup> See Public Notice, Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling That Amendments to Anne Arundel County, Maryland Zoning Ordinance Are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission, DA 02-1044 (May 7, 2002).

The subject that Cingular raises in its Petition – local government ordinances purporting to regulate radio frequency interference ("RFI") – is of significant concern to CMRS carriers and is not limited to Anne Arundel County, Maryland. As described below, a growing number of localities have adopted ordinances that include RFI-related provisions. In effect, these provisions have increased the cost of CMRS network deployment and have delayed the provision of "seamless, ubiquitous and reliable wireless telecommunications systems" that provide for "the nation's public safety and other communication needs." <sup>2</sup>

The Communications Act and a long line of cases establish conclusively that the Commission has exclusive jurisdiction over RFI.<sup>3</sup> The widespread proliferation of RFI-related zoning requirements not only result in bad public policy; such requirements are unlawful and should be preempted by this Commission.

### I. THE COMMISSION AND FEDERAL COURTS HAVE ALREADY DECIDED THE ISSUE RAISED BY THE CINGULAR PETITION

In its Petition, Cingular has asked the Commission to preempt an Anne Arundel County ordinance that requires FCC radio licensees to "provide certification that their use will not degrade or interfere with the County's public radio systems," and specifies that a licensee's certificate of use "may be revoked" if the licensee's radio "degrades or interferes with the County's public safety communications system." The Commission has already held as void and unenforceable a very similar ordinance enacted by another locality. It should therefore quickly grant the Cingular filing.

<sup>&</sup>lt;sup>2</sup> H.R. Rep No. 106-25, Wireless communications and Public Safety Act of 1999, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 4 (1999)

<sup>&</sup>lt;sup>3</sup> See Cingular Petition for Declaratory Ruling (April 23, 2002) at 3-8; Cingular Opposition to Motion to Dismiss, WT 02-100 (June 3, 2002). Sprint concurs with Cingular's extensive legal analysis of this issue.

<sup>&</sup>lt;sup>4</sup> Cingular Petition at 2-3, *quoting* various provisions of Article 28 of the Anne Arundel County Code.

In its 960 Radio Order, a FM radio licensee, KJSN, obtained Commission approval to relocate its radio transmitter to an antenna farm located on Stukel Mountain, Oregon.<sup>5</sup> The local zoning board granted the licensee a conditional use permit, but it imposed the following two restrictions:

- KJSN must not operate the new facility so as to produce electronic interference to existing facilities on Stukel Mountain; and
- KJSN must not operate its new facility so as to cause interference to established translator sites on Stukel Mountain, and must aid KSYS(TV) and KSOR(FM) in retuning... their facilities.<sup>6</sup>

The FM licensee asked the Commission to declare these ordinance restrictions void and unenforceable. The Commission granted the petition, holding that "federal power in the area of radio frequency interference is exclusive; to the extent that any state or local government attempts to regulate in this area, their regulations are preempted":

Because the Communications Act comprehensively regulates interference, Congress undoubtedly intended federal regulation to completely occupy that field to the exclusion of local and state governments. . . . [E]xclusive jurisdiction to resolve questions involving interference has been assigned to the FCC.<sup>7</sup>

The Supreme Court has held that the Commission's Title III jurisdiction "over technical matters [involving radio issues] . . . is clearly exclusive." In fact, the only material legal development that has occurred since the 960 Radio Order is that two federal appellate courts have reaffirmed the Commission's exclusive jurisdiction. Specifically, the Tenth Circuit stated in voiding an ordinance that would have prohibited a cellular carrier from operating in a manner that "interferes with public safety communications" that "Congress intended federal regulation of

<sup>&</sup>lt;sup>5</sup> See 960 Radio, Inc., Licensee of Station KJSN(FM), Klamath Falls, Oregon, Petition for Declaratory Ruling, FCC 85-578 (Nov. 4, 1985)("960 Radio Order").

<sup>&</sup>lt;sup>6</sup> See id. at  $\P$  3.

<sup>&</sup>lt;sup>7</sup> *Id.* at ¶¶ 4, 5 and 7.

RFI issues to be so pervasive as to occupy the field. Thus, the Interference Amendment and Interference Stipulation are void as preempted." The Second Circuit similarly held, in voiding an ordinance that would have prohibited federal licensees from interfering with "appliances and devices in local homes" that "federal law has preempted the field of RF interference regulation":

These statutory provisions make it clear that Congress intended the FCC to possess exclusive authority over technical matters related to radio broadcasting. . . . [T]he FCC enjoy[s] exclusive jurisdiction to regulate RF interference phenomena. . . . . Congress's intent [was] to preempt any local or state attempts to regulate or remedy RF interference. <sup>10</sup>

Because the governing law is settled, the Commission should promptly reaffirm that all local government attempts to regulate or remedy radio frequency interference are preempted and as a result, are void and unenforceable. Indeed, as the Commission itself stated over a decade ago:

Since the facts in this proceeding are essentially uncontroverted and the law establishing the Commission's exclusive jurisdiction over this matter is clear, we see no reason to delay this decision. The Town of Wilton must look to the Commission for interference regulation.<sup>11</sup>

### II. THE PROBLEM DESCRIBED BY CINGULAR IS NOT LIMITED TO ANNE ARUNDEL COUNTY, MARYLAND

As noted, local government ordinances purporting to regulate RF are not limited to Anne Arundel County, Maryland, and Sprint has encountered situations like that described by Cingular

<sup>&</sup>lt;sup>8</sup> Head v. New Mexico Board of Examiners, 374 U.S. 424, 430 n.6 (1963).

<sup>&</sup>lt;sup>9</sup> Southwestern Bell Wireless v. Johnson County, 199 F.3d 1185, 1188, 1193 (19<sup>th</sup> Cir. 1999), cert. denied, 530 U.S. 1204 (2000). The Johnson County Commissioners adopted the unlawful ordinance on August 21, 1997 (id. at 1188) – <u>after</u> the FCC specifically advised the County that "your effort to regulate radio frequency interference (RFI) [is] preempted by the Communications Act." Letter from David L. Furth, Chief, Commercial Wireless Division, to Roger Kroh, Director of Planning and Development, 2000C-SAM (July 2, 1997).

<sup>&</sup>lt;sup>10</sup> Freeman v. Burlington Broadcasters, 204 F.3d 311, 314, 320, 321, 323 (2d Cir. 2000), cert. denied, 531 U.S. 917 (2000).

<sup>&</sup>lt;sup>11</sup> MobileComm of New York, 2 FCC Rcd 5519, 5520  $\P$  8 (1987).

in multiple jurisdictions. For example, on March 7, 2002, the St. Tammany Parish Council (Louisiana) amended its land use ordinance to require carriers to submit intermodulation studies showing that proposed systems "will not interfere with the signals of the public agencies:"

Prior to the issuance of a permit for a new tower or co-location, each carrier must provide intermodulation studies by a licensed engineer analyzing the proposed transmission of the carriers and the existing transmission of public agencies. This study must demonstrate and certify that the carrier's signals will not interfere with the signals of the public agencies. <sup>12</sup>

Other ordinances are written even more broadly. For example, the Borough of Wind Gap, Pennsylvania has required that a wireless carrier must demonstrate, *via* an "intermodulation analysis certified by a Professional Communications Engineer," that its proposed facility "will not cause RF interference to any existing communications services," which is defined to include "other Towers or Transmitting Facilities [or] communications services reception by other property owners." Similarly, a zoning ordinance adopted by St. Mary's County, Maryland specifies that "no tower or equipment or antennae attached thereto shall cause localized interference with reception of television and radio broadcasts."

Local governments are also with increasing frequency attempting to impose on PCS licensees the burden of resolving any interference, even though PCS licensees are operating within the emission levels that the Commission has established for PCS. For example, the zoning ordinance adopted by Salisbury Township in Leigh County, Pennsylvania provides:

St. Tammany Parish Land Use Ordinance 523 § 3.03 AN.III.E.4 (revised March 7, 2002), *available at* http://stp.pa.st-tammany.la.us/departments/planning/luord523/sec3-03.html#AN (emphasis provided).

<sup>&</sup>lt;sup>13</sup> Borough of Wind Gap, County of Northampton, Pennsylvania, Ordinance No. 406, at 6 § 9 and 13 § o(4).

<sup>&</sup>lt;sup>14</sup> St. Mary's County, Maryland Zoning Ordinance, Article V, § 53.10, at p.3 § 2(c). *See also* St. Tammany Parish Land Use Ordinance 523 § 3.03 AN.I.C.10(d) (revised March 7, 2002).

The applicant shall be responsible to resolve all instances of interference caused by the actual operation of the Tower that occurs after its installation.<sup>15</sup>

As discussed above, however, as a matter of law, local governments do not have the regulatory authority to intervene in radio frequency interference issues.

These kinds of radio frequency ordinances are also inhibiting Sprint's ability to improve the quality of its services and to enter new markets so consumers enjoy additional competitive choices. For example, on January 2, 2002 Sprint PCS secured from the Washington Township Board of Adjustment approval to construct a new telecommunications monopole in Washington Township, New Jersey. Condition 8 of the resolution approving the Sprint proposal provides:

The use shall continue to comply with all Federal and State regulations regarding radio emissions and shall not interfere with radio, police or fire facilities or any other communications emissions, including television and radio. In the event that such interference does occur, the Applicant shall promptly remove the interference by whatever means necessary.<sup>16</sup>

After Sprint obtained variance and site plan approval to construct a 120-foot high stealth tree designed monopole, Sprint retained Sitesafe, an engineering firm, to conduct specific tests to determine if the construction of Sprint's telecommunications monopole could disturb the AM station antenna pattern of WRNJ (AM), an AM station located near the approved monopole facility. After Sitesafe contacted WRNJ, by letter dated February 26, 2002, regarding the testing of the station's nighttime field measurements, the station demanded, via a letter from its attorney, that Sprint pay for the station's attorney's fees and fees for a consultant engineer. After Sprint declined, representatives of the radio station appeared unilaterally, without notice to Sprint, before the Washington Township Board of Adjustment at its April 3, 2002, public meeting to voice

<sup>&</sup>lt;sup>15</sup> Salisbury Township, Lehigh County, Pennsylvania, Zoning Ordinance, p. 414 § 16.0(5) (March 2001).

<sup>&</sup>lt;sup>16</sup> Washington Township Board of Adjustment Resolution No. 2002-06 at 10 (Jan. 2, 2002).

their concerns regarding Sprint's monopole. Thereafter, the Board of Adjustment advised Sprint that:

It is the Board of Adjustment's opinion that it is the sole responsibility of Sprint to make sure that WRNJ radio transmissions are not interfered with and disagree with the letter from [Sprint] that any burden, financial or otherwise should be the responsibility of WRNJ or anyone else who may experience interference. *Until such time as WRNJ is satisfied that there is no interference or financial burden placed upon them due to the Sprint Tower Site this condition of the resolution [No. 8 quoted above] is not met and a building permit may not be issued.*17

Simply put, the Township intervened in a dispute about potential interference between Sprint's monopole and an AM broadcaster. Instead of allowing the parties to resolve their differences in a manner consistent with the FCC's rules – as Sprint has done in numerous locations throughout the Nation, the Township made unilateral satisfaction of the broadcaster's demands a condition for obtaining a building permit.

The Communications Act is clear that local governments have no authority to regulate the entry of PCS licensees such as Sprint PCS.<sup>18</sup> If local governments do not have the legal authority to control Sprint PCS' entry, they certainly do not have the jurisdiction to delegate such authority to private parties.<sup>19</sup>

<sup>&</sup>lt;sup>17</sup> Letter from Virginia R. Kesper, Washington Township Board of Adjustment Secretary, to Ms. Diane M. Constantine, Law Offices of Alan B. Zublatt, at 2 (April 5, 2002).

<sup>&</sup>lt;sup>18</sup> See 47 U.S.C. Section 332©(3)(A)("[N]o State or local government shall have any authority to regulate the entry of . . . any commercial mobile service . . . .").

For the record, Sprint notes that this particular dispute may be near resolution, although not without the diversion of significant resources and time. On June 6, 2002, Washington Township's counsel wrote Sprint to acknowledge that the Township does not, in fact, have jurisdiction to regulate RFI. More specifically, after Sprint submitted a detailed letter citing many of the cases included herein, the Township Board of Adjustment "recognizes and acknowledges that its authority to exercise its zoning power is limited to matters not directly regulated by the FCC and that regulation of RFI is preempted by the federal FCC regulations . . . ." The Board also noted that an RFI remedy is available to any aggrieved party pursuant to FCC rules, "which preempt local government from regulating RFI disputes." Letter from Gail H. Fraser to Michael S. Selvaggi, Esq. (June 6, 2002).

Sprint believes that one reason these unlawful RFI-related ordinances are beginning to proliferate is due to new business arrangements being promoted by certain local government telecommunications consultants. One such consultant claims it has generated "more than \$10 million in new Non-Tax revenue" for its local government clients:

Notably, our services in the area of regulating the siting, placement, construction of modification of wireless telecommunications facilities have never cost a client a dime out of budget.<sup>20</sup>

This consultant describes its fee arrangement in a slide presentation for prospective clients as follows:<sup>21</sup>

## Cost of Services for The Center for Municipal Solutions

• Expert Review and Analysis of all wireless applications:

Application Review and Analysis \$0
Engineering review (Structural, RF, etc.) \$0
Yearly retainers NONE

• OUR SERVICES COST COMMUNITIES NOTHING!!

Instead, they are paid for by the Wireless applicants
Through an *escrow account* that the community manages.

Thus, the more restrictions that the consultant can convince the local government to adopt, the more work (and revenues) the consultant generates for itself. This particular consultant identifies 24 different subjects that a community supposedly can "control," including "[i]nterference with other communications and electronic devices."

<sup>&</sup>lt;sup>20</sup> The Center for Municipal Solutions, A Little Bit About the Firm, /www.telecomsol.com/about\_us.html.

<sup>&</sup>lt;sup>21</sup> See www.telecomsol.com/slid\_show/Slide\_Show\_files/slide0005.htm (emphasis in original).

Towers and Wireless Facilities, What a Community Can Control, www.telecomsol.com/24\_items.html.

In summary, the subject raised by Cingular's petition is by no means limited to Anne Arundel County, Maryland. Impermissible RF ordinances are becoming widespread, and the Commission should address this growing problem.

## III. THE COMMISSION SHOULD CONFIRM THAT LOCAL GOVERNMENTS LACK AUTHORITY TO REQUIRE LICENSEES TO CERTIFY COMPLIANCE WITH FEDERAL LAW OR NON-INTERFERENCE TO OTHERS

In addition to local government intervention in RFI issues, a growing number of local governments are beginning to require radio licensees to submit a variety of regulatory compliance certifications regarding carrier conformance with *Federal* rules and regulations. Further, in many instances, these certifications are not straightforward statements that merely require the signature of authorized company experts. Instead, the local zoning authority requires carriers to provide a detailed engineering analysis by a licensed engineer certifying that the facility meets or exceeds FCC requirements.<sup>23</sup> In some cases the zoning authority requires that carriers pay its chosen expert for such a federal compliance certification, and even requires carriers to submit funds to an escrow account for this purpose.<sup>24</sup> And in a growing number of localities, carriers are required to file *annual* certifications of compliance with the FCC's guidelines for radio frequency emissions, mandating additional expert certifications.<sup>25</sup>

Sprint submits that the requirement that Federal licensees provide evidence that they are not violating Federal rules and regulations represents an unlawful expansion of local power. Moreover, compliance with these types of certification requirements is expensive, time consum-

<sup>&</sup>lt;sup>23</sup> See e.g., St. Mary's County, Maryland Zoning Ordinance, Article V, § 53.10 at p.4, Section (13).

Ordinance Amending § 2.3, *Definitions*, Repealing § 6.5.9 *Cellular Transmission Antennas* of § 6 – Special Permit Uses, and Adopting a New § 6.5.9 Entitled "*Wireless Telecommunications Facilities*", of the City of New Rochelle, New York (January 8, 2002) at §§ 6.5.9.11 and 6.5.9.17.

<sup>&</sup>lt;sup>25</sup> *Id.* at § 6.5.9.20

ing and, most significantly, does not provide local authorities with any tangible benefit. Commission licensees are already required to comply with the FCC's rules. Failure to do so can result in serious consequences by virtue of Commission enforcement action and federal licensees – particularly commercial providers – are well aware of this fact. Therefore, local certification requirements add nothing to existing FCC rules, divert company resources, delay facility deployment and increase costs for consumers.

Aside from the fact that these requirements do not make sense as a matter of policy, the Commission should confirm that these kinds of certifications are void and unenforceable as a matter of law. The applicable preemption doctrine here is known as "field preemption," which occurs when Congress manifests the intent to occupy exclusively an entire field of regulation.<sup>26</sup> The Supreme Court has held that with field preemption, there is "no room for the States to supplement" federal law.<sup>27</sup> As the Commission has noted, with field preemption, federal law "completely occup[ies] that field to the exclusion of local and state governments" and that even local government "attempts to regulate . . . are preempted."<sup>28</sup>

In *MobileComm of New York*, the Town of Wilton, Connecticut enacted an ordinance requiring radio licensees to notify Town officials if they "changed the power and/or frequency of its transmission." A paging carrier added a transmitter as Commission rules permitted, but it did not notify the Town as the ordinance specified. The Town proposed to punish the licensee

See Southwestern Bell Wireless v. Johnson County, 199 F.3d 1185 (19th Cir. 1999), cert. denied, 530 U.S. 1204 (2000); Freeman v. Burlington Broadcasters, 204 F.3d 311 (2d Cir. 2000), cert. denied, 531 U.S. 917 (2000).

<sup>&</sup>lt;sup>27</sup> Fidelity Federal Savings & Loan v. De la Cuesta, 458 U.S. 141, 153 (1982). See also Rice v. Santa Fe Elevator, 331 U.S. 218, 230 (1947).

<sup>&</sup>lt;sup>28</sup> 960 Radio Order at ¶¶ 4 and 7.

<sup>&</sup>lt;sup>29</sup> *MobileComm of New York*, 2 FCC Rcd 5519 ¶ 3 (1987).

for ignoring its ordinances, and the licensee filed a declaratory ruling petition. In granting the petition, the Commission held that the notification ordinance was "null and void":

[F]ederal power in the area of radio frequency interference is exclusive and to the extent that any state or local government attempts to regulate in this area, their regulations are preempted.<sup>30</sup>

If local government "notification" requirements are null and void, local government "certification" requirements are also null and void. After all, with field preemption, there is "no room for the States to supplement" federal law.<sup>31</sup>

As noted above, such local RF certifications are wasteful and inefficient. The Commission is the Nation's expert agency on radio emissions. The Commission has adopted detailed rules governing interference among different radio licensees and governing emission levels necessary to protect public health and safety.<sup>32</sup> Commission rules presume that licensees follow its mandatory requirements, and the Commission has available full enforcement authority in the event a licensee contravenes its rules. Further, local governments have an available remedy if they believe that a licensee is not complying with the Commission's rules – to file a complaint with the Commission.

CMRS carriers incur needless costs in complying with local government "notification" and "certification" requirements. Moreover, local governments receive no tangible benefit by being told that FCC licensees comply with FCC rules. Sprint submits that the only beneficiaries of such requirements are so-called "local telecommunications consultants." Lastly, as is often

 $<sup>^{30}</sup>$  *Id.* at 5520 ¶ 8.

<sup>&</sup>lt;sup>31</sup> Fidelity Federal Savings & Loan v. De la Cuesta, 458 U.S. 141, 153 (1982). See also Rice v. Santa Fe Elevator, 331 U.S. 218, 230 (1947).

In fact, the Commission's rules governing emission levels are set "thousands of times below levels considered to be safe by expert agencies." Fact Sheet No. 2, Nations Wireless Siting Policies, at 12 (Sept. 17, 1996)(emphasis added).

the case with increased siting costs and delays, consumers end up paying for the costs that are incurred by carriers complying with these unnecessary local ordinances.<sup>33</sup>

#### IV. CONCLUSION

For the foregoing reasons, Sprint PCS respectfully requests that the Commission grant the Cingular Petition and make clear that all local government attempts to regulate radio frequency issues are null and void as a matter of law.

Respectfully submitted,

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Although the Commission addressed the question of whether local governments might require FCC licensees to show compliance with FCC rules in its *Relief from State and Local Regulations Order*, 15 FCC Rcd 22821 (2002), the Commission actually made no decision. *See id.* at 22828-89 ¶ 18. As noted above, the Commission does not have the flexibility to delegate authority to local governments, given the Commission's own recognition that it has exclusive jurisdiction to act in this area.